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Nos. 07-1090 & 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER,

v.

JORDAN BEATY, ET AL., RESPONDENTS.

REPUBLIC OF IRAQ, ET AL., PETITIONERS,

v.

ROBERT SIMON, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS ROBERT SIMON, *et al.*

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QUESTION PRESENTED

Whether Iraq is subject to the jurisdiction of the courts of the United States for torturing U.S. soldiers and civilians.

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	Abbreviated Herein As
Foreign Assistance Act of 1961	FAA
Iraq Sanctions Act of 1990	ISA
Emergency Wartime Supplemental Appropriations Act of 2003	EWSAA
National Defense Authorization Act for Fiscal Year 2008	NDAA
Foreign Sovereign Immunities Act	FSIA
Prisoners of War	POWs

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STATEMENT OF THE CASE

On August 2, 1990, Iraq, led by Saddam Hussein, invaded and occupied Kuwait. The U.S. Department of State designated Iraq a state sponsor of terrorism on September 13, 1990.[1] On January 16, 1991, following U.N. Security Council authorization, an international coalition of 33 nations went to war to force Iraq out of Kuwait. During this conflict, the Iraqi military captured and tortured Robert Simon, Roberto Alvarez, Nabil Seyam, and the 17 American military personnel named as plaintiffs in *Acree v. Republic of Iraq* ("*Acree*"). Theirs are among the very few remaining cases against Iraq.[2]

A. The Plaintiffs

1. Bob Simon and Roberto Alvarez

CBS News reporter Bob Simon and CBS News cameraman Roberto Alvarez were kidnapped on January 21, 1991, while filming on the border of Saudi Arabia and Kuwait. Petitioners tortured Simon and Alvarez alongside the American POWs of the *Acree* case. They were subjected to beatings with rifles, clubs, fists, and boots; starvation; and confinement in near-total darkness. The Iraqis made Simon and Alvarez believe they would be beheaded or hanged, just as others before them. On one occasion, an Iraqi military officer forced Simon's jaw open, spat down his throat, and shouted "Yahoudi" (Arabic for "Jew").

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[1] *See* Department of State—Determination Iraq, 55 Fed. Reg. 37,793 (Sept. 13, 1990); 15 C.F.R. §746.3(b) (2006).

[2] *See* Br. for Pet'rs at 9 n.3.

As "human shields," they were inside an Iraqi Intelligence Service building which collapsed around them when it was hit by four 2,000-pound bombs dropped by Coalition forces. While held hostage they were never permitted to notify their families that they were alive. A Miami newspaper reported that they had been executed, furthering the pain of their families.

2. Nabil Seyam

Nabil Seyam, a safety engineer, hid from Iraqi forces for two months before being taken hostage. Because Seyam (now deceased) was an Arab-American, his interrogators gave him the opportunity—with a gun to his forehead—to renounce on television his U.S. citizenship in exchange for being reunited with his family. He refused—and was tortured. Once in Baghdad, Seyam was placed in a bombing target—a hotel converted to Iraqi military quarters—to be used as a "human shield." More than a decade later, living in Wichita, Kansas, he continued to suffer paralyzing headaches and reoccurring pain in his genitals. Tormented by phantoms, Seyam often woke from recurring nightmares of his beatings and humiliations to find himself alone in the darkness of his room, striking out against aggressors who were not there.

3. The *Acree* Plaintiffs

The Iraqi military captured 21 American servicemen, including these 17 POWs. The torture began immediately, and the beatings were incessant. Blindfolded for their interrogations, isolated in darkened

cells, they saw little and could hear nothing, save the screams of their fellow prisoners. The torture included beatings, electric shocks, burns, whippings, starvation (save for eating urine-soaked bread and their own scabs), severe cold and filth, genital inspections to identify Jews, mock executions with pistols to their heads, and threatened castration and dismemberment. Iraq also used the POWs as "human shields".

Once home, all went back into active duty, but their ordeal shadowed them, with some reacting violently to noises, lights, balloons popping, doors slamming, the crack of ice cubes melting, or their children playing. Not the least of their suffering was putting their families through their long-term mental and physical recovery.

B. The *Acree* Litigation

On July 7, 2003, the district court found the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service liable to the *Acree* plaintiffs. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), *vacated*, 370 F.3d 41 (D.C. Cir. 2004).

The United States moved to intervene and vacate the judgment, claiming that the court's jurisdiction had been revoked in May 2003, pursuant to authority allegedly conferred upon the President in §1503 of the April 16, 2003 Emergency Wartime Supplemental Appropriations Act ("EWSAA").[3] The district court denied the United States' motion. *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95, 102 (D.D.C. 2003), *rev'd*, 370 F.3d 41 (D.C. Cir. 2004).

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[3] Pub. L. No. 108-11, 117 Stat. 559, 579 (2003).

In connection with the EWSAA, on May 2, 2003, the President sent notification to Congress of his intent to invoke §1503. He then exercised his §1503 authority in a May 7, 2003 Determination, simply repeating the text of the section.[4] Only later, on May 22, 2003, in a letter to Congress, did the President assert that §1503 abrogated with respect to Iraq §1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA").[5]

Following the district court's denial of its motion to intervene in *Acree*, the United States appealed. The court of appeals ruled that §1503 of the EWSAA did not affect the jurisdiction of the courts over cases against Iraq under the FSIA's terrorism exception to immunity. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004).

C. The *Simon* and *Seyam* Litigation

The *Simon* and *Seyam* plaintiffs filed their actions on March 18, 2003, and April 15, 2003, respectively. The cases were dismissed.

The court of appeals reversed and remanded the *Simon* and *Seyam* cases, ruling that the President's waiver of §1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA")[6] for claims against Iraq did not divest the courts of jurisdiction over cases which were pending under §1605(a)(7) of the FSIA when the NDAA went into effect. *Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008).

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[4] J.A. 396–97.

[5] J.A. 402–04.

[6] 122 Stat. 3 (2008) (to be codified at 28 U.S.C. §1605A).

D. The Relevant Statutes

1. The Iraq Sanctions Act of 1990

On September 13, 1990, the Secretary of State designated Iraq as a state sponsor of terrorism.[7] As a result, Iraq was made subject to the sanctions that apply to countries on the State Department list of state sponsors of terrorism. Two months later, Congress enacted the Iraq Sanctions Act of 1990 ("ISA").[8] That act consolidated and codified *preexisting* sanctions against Iraq imposed by other statutes and executive orders, and detailed the penalties for violating those already extant sanctions and embargoes.[9]

2. Section 1503 of the EWSAA (App. C)

Section 1503 of the EWSAA, passed by Congress in April 2003, before the United States took control of Baghdad, authorized President Bush to suspend the application of any provision of the ISA, subject to eight provisos. *See* EWSAA §1503, 117 Stat. 579. Provisos six through eight are purely procedural.[10] *Proviso eight*, for

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[7] *See supra* note 1.

[8] Pub. L. No. 101-513, 104 Stat. 1979, 2047 (1990).

[9] *See id.*; Exec. Order No. 12722, 55 Fed. Reg. 31,803 (Aug. 3, 1990); Exec. Order No. 12724, 55 Fed. Reg. 33,089 (Aug. 13, 1990); *see also* Kenneth Katzman, *Iraq: Post-Saddam Governance and Security*, CRS Rept. for Cong. No. RL31339, at 25 (Feb. 5, 2009) (the ISA "reinforced" Executive Orders 12722 and 12724), *available at* http://opencrs.com/.

[10] *See* App. C at 13a (Guide to EWSAA §1503).

example, referred to as the sunset proviso, provided for the expiration of the authorities granted in §1503 "on September 30, 2004, or on the date of enactment of a subsequent Act *authorizing assistance for Iraq* and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." EWSAA §1503, 117 Stat. 579 (emphasis added).

Each of the remaining five provisos mirrored a specific portion of the ISA and either: made exceptions to §1503's grant of presidential authority; immediately suspended specific provisions of the ISA; or clarified the President's authority to suspend §620A[11] of the Foreign Assistance Act of 1961 ("FAA").[12]

Of those remaining five provisos, the first and third provisos made exceptions to the grant of authority provided in §1503:

The *first proviso* mandates that nothing in §1503 shall "affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992…."[13] Section 1603 of the Non-Proliferation Act, entitled "Application to Iran of Certain

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[11] Section 620A of the FAA prohibits U.S. assistance from being provided via the FAA, as well as three other statutes, to nations that have been placed on the Secretary of State's list of state sponsors of terrorism. This prohibition prevents most, if not all, of U.S. foreign aid from reaching listed governments. Foreign Assistance Act of 1961, Pub. L. No. 976-195, 72 Stat. 424 (codified at 22 U.S.C. §§2151 *et seq*.).

[12] *Acree*, 370 F.3d at 53. *See* App. C at 13a (Guide to EWSAA §1503).

[13] *See* EWSAA §1503, 117 Stat. 579.

Iraq Sanctions," incorporates by reference paragraphs (1) through (4) of §586G(a) of the ISA.[14] Accordingly, absent this proviso, had President Bush waived the ISA in its entirety, he would have waived these sanctions against Iran, and §1603 would no longer incorporate, against Iran, ISA sanctions that applied to Iraq.

Proviso three mandated that military equipment "shall not be exported under the authority of this section."[15] Like proviso one, proviso three prevents the President from waiving the ISA in its entirety by expressly preserving the portions of §586G(a) of the ISA that prevent the exportation of military equipment.

Provisos four and *five* immediately suspended provisions of the ISA without any action by the President. These provisos demonstrate the fast-approaching need addressed by §1503: to provide emergency economic assistance to war-torn Iraq at the moment the President deemed appropriate.

Proviso four immediately suspended §307 of the FAA "with respect to programs of international organizations for Iraq...."[16] Section 307 of the FAA prevents monies appropriated under Chapter 3 of that Act from being used to fund programs of international organizations benefiting governments out of favor with

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[14] *See* Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, §1603, 106 Stat. 2315 (codified at 50 U.S.C. §1701 note (2000)).

[15] EWSAA §1503, 117 Stat. 579.

[16] *Id.*

the United States.[17] By inserting proviso four into §1503, Congress ensured that the United States could provide funding for international aid organizations in Iraq unimpeded by §307 of the FAA upon suspension of §620A of the FAA.

Proviso five immediately suspended "provisions of law that direct[ed] the United States Government to vote against...loans...to Iraq."[18] Proviso five is responsive to §586G(a)(5) of the ISA, which directs the United States to "oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with §701 of the International Financial Institutions Act (22 U.S.C. 262d)."[19]

Proviso two, like the other provisos listed beneath the enacting clause of §1503, clarified the President's authority with regard to suspension of provisions of the ISA. *See infra* Section I.A.

3. Section 1083 of the NDAA

On December 14, 2007, Congress passed H.R. 1585, 110th Cong. (2007), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original Act"). In §1083 of the original Act, Congress amended §1605 of the FSIA to enhance certain rights of plaintiffs

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[17] At the time of Iraq's addition to the list, those governments expressly ineligible for benefits under FAA §307 included: Burma, Iraq, North Korea, Syria, Libya, Iran, Cuba, and the Palestine Liberation Organization.

[18] EWSAA §1503, 117 Stat. 579.

[19] ISA §586G(a)(5), 104 Stat. 2052.

suing foreign terrorist states and to clarify the applicable statute of limitations.

Following its passage by Congress, the original Act was sent to the President. On December 28, 2007, the President, bowing to pressure from Iraq,[20] issued a "Memorandum of Disapproval" (rather than the formal, sealed "Veto Message" that accompanies a return veto) announcing that he was exercising a "pocket veto" over the bill.[21] At the same time, the President sent the original Act back to the House declaring that, in the event the pocket veto was subsequently determined to be ineffective, he intended to exercise a "return veto."[22]

On January 22, 2008, Congress passed a revised version of the original Act. The revised National Defense Authorization Act for Fiscal Year 2008 ("NDAA") retained the earlier version of §1083 in its entirety, the only difference being that the revised NDAA gave the President the authority to waive, with respect to Iraq only, the supplemental rights conferred in §1083, *i.e.*, those making it easier to sue terrorist states and to attach property.

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[20] "Only after lawyers for the Iraqi government threatened to withdraw $25 billion worth of assets from U.S. capital markets early this week did the White House decide to let the bill die…." Josh Rogin, *At Iraq's Urging*, *Bush Pocket-Vetoes Defense Authorization Bill*, CQ Today – Defense (Dec. 28, 2007), *available at* http://public.cq.com/docs/cqt/news110-000002650500.html. This undermines Iraq's claim that the President vetoed the NDAA because §1083(c)(4) cast doubt on any prior exercise of foreign policy authority. Br. for Pet'rs at 37.

[21] J.A. 411–14.

[22] *See id.*

On January 23, 2008, Respondents (the *Simon/Seyam* plaintiffs) filed a motion at the court of appeals arguing that the President's "hybrid veto" of the original Act was unconstitutional and that consequently, the original Act had become law on December 31, 2007—11 days after presentment.

The President signed the revised NDAA on January 28, 2008, and on that same day, he made the findings which Congress required as a condition of exercising the waiver of §1083's supplemental rights as applied to Iraq.

4. The Foreign Assistance Act of 1961

The Foreign Assistance Act of 1961 ("FAA") organized already existing U.S. aid initiatives, including the economic and technical assistance functions of the International Cooperation Agency, the loan functions of the Development Loan Fund, the currency functions of the Export-Import Bank, and the agricultural functions of the Food for Peace program.[23] The FAA remains the seminal channel of U.S. foreign aid.

Section 620A of the FAA prohibits assistance under the FAA and three related acts to any country listed by the Secretary of State as repeatedly providing support for acts of international terrorism.

Section 307 of the FAA withholds the United States' share of funding for programs of international organizations which benefit governments identified in the section as out of favor with the United States.

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[23] http://www.usaid.gov/about_usaid/usaidhist.html.

SUMMARY OF THE ARGUMENT

The statutes listed in §620A(a) of the FAA provide the plain meaning of the second proviso of the EWSAA. That plain meaning, along with the sunset clause of the EWSAA, compel the conclusion that the federal courts retain jurisdiction pursuant to §1605(a)(7). This is confirmed by the conventions and presumptions of statutory construction as well as the legislative history of the EWSAA. The NDAA had no effect on this.

ARGUMENT

I. Congress Did Not In Proviso Two Of §1503 Of The EWSAA Give The President The Authority To Repeal Federal Jurisdiction Under §1605(a)(7) Of The FSIA.

Though the Petitioners rest their argument on the plain meaning of the second proviso of §1503 of the EWSAA, nowhere do Petitioners articulate what that meaning is. *See* Br. for Pet'rs at 22–28 ("Iraq Br."). The United States, on the other hand, does venture a definition of the proviso's plain meaning—"That provision unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries designated as state sponsors of terrorism." [24] —but this is a false plain meaning, for it reads into the proviso something which is not in the language itself: the narrowing idea that the statutes must expressly refer to nations that have been designated as terrorist states.

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[24] Br. for the United States as *Amicus Curiae* at 11 ("U.S. Br.").

What follows is an explication of the unacceptable failings which beset the government's false plain meaning. We shall then set forth the only acceptable plain meaning of the second proviso of §1503 of the EWSAA, a construction which excludes §1605(a)(7) of the FSIA. Throughout this, the Court should remain aware that the Petitioners have refused to offer a definition of the statute's plain meaning.

Even under the government's constricted reading, it is unclear whether the government means statutes which refer to "terrorism" and have a collateral effect on the countries which support it, or whether its reading is further limited to laws which expressly mention "countries which have been designated [by the Secretary of State] as terrorist states." Finally, the government does not indicate whether its definition reaches state and local statutes and international treaties, as well as federal statutes. Congress, it need be added, knows how to use more exact language along the lines of the United States' construction.[25]

The second proviso, when scraped of exogenous implications, becomes, in its literal reading, absurdly vague, including all statutes of general application (state

[25] *See*, *e.g.*, 25 U.S.C. §703(a) (2006) ("all statutes of the United States which affect Indians because of their status as Indians, *excluding statutes that specifically refer to* the tribe and its members") (emphasis added); 12 U.S.C. §1723a(b) (2006) ("or in *other laws specifically applicable to* Government corporations") (emphasis added); I.R.C. §833(c)(4)(B)(i) (2006) ("*State laws which are specifically and exclusively applicable to* not-for-profit health insurance or health service type organizations") (emphasis added).

law, federal law, and treaties) which happen to affect countries which have supported terrorism, regardless of whether those statutes specifically reference terrorism:

> For example, statutes imposing general tariffs would be included within the proviso if the tariffs happened to apply to goods exported from nations that had supported terrorism, whether or not the statute imposing the tariff made any reference to terrorism. So too the taxes which state and local governments impose upon the commercial transactions of foreign states. The President could also abrogate portions of the U.S. Code which would punish Iraq for genocide, the use of chemical weapons, and assisting nuclear, chemical, and biological proliferation.[26]

That the government's reading of proviso two of §1503 is materially narrower than that which is justified by the plain language of the proviso was pointed out to the government by Judge Randolph in the oral argument in *Acree v. Snow*, No. 03-5195, 2003 U.S. App. LEXIS 27789 (D.C. Cir. Oct. 7, 2003):

> Randolph, J.: You're not reading the plain meaning of the statute, though. You come up here and you say this has got a plain meaning. Let me suggest to you that it doesn't. The statute by, if you read it literally, the President could wipe out federal question jurisdiction for Iraq.

Acree v. Snow Tr. at 30 (App. A at 3a). In short, the problem with a broader reading of the statute is that though it is

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[26] *See* 18 U.S.C. §1091 (2006); 22 U.S.C. §5605 (2006); 22 U.S.C. §6303 (2006); 50 U.S.C. §2410c (2000).

certainly plain it is also certainly redundant[27] and absurd,[28] a point also made by Judge Randolph.[29] In summary, under this problematic plain meaning of the proviso, President Bush would have been given the power, at the very least, to abrogate, with respect to Iraq, any provision of the U.S. Code.[30]

A. The Plain Meaning Of Proviso Two Of §1503 Is Limited To The Statutes Listed In §620A(a) Of The FAA.

The only acceptable plain meaning of "any other provision of law that applies to countries that have supported terrorism" is to confine it to the statutes contained in §620A(a):

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[27] *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

[28] *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of §692 'would produce an absurd and unjust result which Congress could not have intended.'").

[29] "[T]he plain meaning of this thing takes us off into the blue yonder, and I don't think that's where you want it to go." *Acree v. Snow* Tr. at 32 (App. A at 6a).

[30] Such as: taxes levied on foreign governments for capital gains through commercial activities, *see* Temp. Treas. Reg. §1.892-3T(a)(2) (1988) and I.R.C. §892 (2006); taxes on non-governmental sales and leases of properties, *see* Temp. Treas. Reg. §1.892-4T(c) (1988); and local laws such as real estate taxes. *See Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2354–55 (2007).

Proviso two of §1503 reads, "the President may make inapplicable with respect to Iraq *section 620A of the FAA of 1961* or any other provision of law that applies to countries that have supported terrorism." Subsection (a) of §620A, in turn, lists a large number of provisions of law which provide funds to foreign nations and then states that those funds may not go to nations which have supported terrorism.

> (a) PROHIBITION.—The United States shall not provide any assistance under [the FAA[31]], the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Export-Import Bank Act of 1945 to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

Once the list of provisions in §620A(a) is identified, it is more than obvious that the "provisions" referred to in proviso two are those in §620A(a).[32] And that is where this case ends.

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[31] The FAA comprises 400 pages of provisions granting assistance to foreign states.

[32] The structure of proviso two gave the President the ability to bypass the time-consuming procedure set forth in the rescission and waiver sections of §620A(c) and (d) of the FAA (thereby effecting immediate assistance to Iraq) and also allowed the President to choose from the multitude of foreign assistance provisions listed in §620A of the FAA those to which he wished to give effect.

The logic of this is supported by the manner in which we naturally make sense of indefinite language: that is, we interpret such language by first appealing to the immediately preceding linguistic context.[33] For example, you say to your friend, "There's the refrigerator, take anything you like." Your use of the second phrase would not give your friend the authority to take your car or your dog, or for that matter the refrigerator itself. What your friend can take is naturally restricted by the specific phrase in the first sentence ("the refrigerator").

Expanding on the above, within any language as broad and indefinite as that found in the final phrase of proviso two, there exists an implicit qualification on the

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[33] *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 26 (1997) ("If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else."); *see* Paul Georg Meyer, *et al.*, *Synchronic English Linguistics: An Introduction* 147 (2002) (discussing how preceding textual material gives coherence to a subsequent clause in the same sentence); Stephen Neale, Expert Report of Stephen Neale Submitted by Defendant Attorney General Alberto R. Gonzales, at 73, in *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181 (3d Cir. 2008) (discussing how context pertains to "linguistic links and dependencies" which may be "internal to particular phrases or sentences"); Stephen Neale, *Descriptions* 101–02 (1990) (discussing how the interpretation of phrases introduced by quantifier terms (*e.g.*, "any," "some," "no," "the," and "most") "are completed using material from the clauses containing their antecedents.").

reach of the terms.[34] In this case, the relevant phrase ("any other provision of law that applies to countries that have supported terrorism") is intrinsically broad and vague,[35] and therefore requires restriction to produce a plausible meaning. This is obvious from the simple example that "any other provision of law that applies to countries that have supported terrorism" as

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[34] *See Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 849–50 (2008) (Breyer, J., dissenting) ("[W]ords such as 'all,' 'any,' 'never,' and 'none' normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work"; and providing a relevant example: that the phrase "there isn't any butter," uttered to his wife, is constrained by common sense and context to the refrigerator, or some other contextually relevant locale, *e.g.*, the kitchen); *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) ("It is, however, a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'") (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); s*ee* Stephen Neale, *Descriptions* 93–102 (1990) (establishing that when quantifier terms introduce an expression, the reach of that expression is qualified by context); Stephen Neale, *On Location*, *in* M. O'Rourke & C. Washington, *Situating Semantics* 284–302 (2007).

[35] *See* discussion *supra* pp. 12–14. *See also* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretative Problems*, 76 Miss. L.J. 55, 114–15 (2006) (distinguishing statutory vagueness from statutory ambiguity and noting that where a phrase's extension is uncertain the phrase is vague); Timothy Endicott, *Vagueness in Law* 133 (2001) (discussing the inter-related nature of vagueness, context dependence, and unspecificity).

it occurs here is tacitly understood by all concerned as not including, say, *Russian* law, or for that matter *Iraqi* law. So all parties accept that the reach of "any other provision of law that applies to countries that have supported terrorism" as it occurs in proviso two is restricted *at least* to *U.S.* law—despite the fact that the more specific phrase "any other provision of United States law that applies to countries that have supported terrorism" could have been used in proviso two, but was not.

Without the device of common sense qualification, by which intrinsically vague terms are comprehended, the phrase "any other provision of law ..." eludes sensible confinement, while working absurd results.[36]

Because it is incontrovertible that "any other provision" is implicitly qualified in *some* way, the question at issue concerns the precise form of the qualification. The only plausible qualification in this case is that which restricts the provision to the very definite, specific, and preceding list in §620A(a). Simply stated, the phrase "any other provision ..." is a linguistic compression of all that is found in §620A(a).

Also, the use of repetitive language is a means whereby phrases are connected.[37] Proviso two states

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[36] *See supra* pp. 13–14.

[37] *See* J.M.D. Meiklejohn, *English Language: Its Grammar, History, and Literature* 181–82 (1906); R.E. Asher & J.M.Y. Simpson, *The Encyclopedia of Language and Linguistics* 604 (1994); Paul Georg Meyer, *et al.*, *supra* note 33, at 148.

that the proviso operates with respect to §620A of the FAA and to laws applied to "countries that have supported terrorism." Section 620A itself specifically echoes this language, setting forth a list of statutes applying to countries that have "provided support for acts of international terrorism," giving internal, consistent meaning to the two phrases in proviso two. The definition of the phrase "any other provision of law" is found, *qua* list, in the very text of §620A(a), as referenced in proviso two.

In the foregoing discussion, we have described the linguistic necessity for construing proviso two as referring to the statutes listed in §620A(a). But it is not alone the language of proviso two which forces that conclusion; it also follows from the structure of the immediately surrounding text (which, it should be noted, parallels the analysis in *Ali*[38]):

To start with, the placement of the relevant language at the end of a proviso strongly suggests that a narrowing construction must be given to the words "any other provision."[39] So too that this specific proviso is embedded within a string of provisos, all of which directly relate to specific portions of the ISA.[40] Lastly, a broad and unrestrained interpretation of "any other

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[38] 128 S. Ct. at 838. *See Acree*, 370 F.3d at 52 ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'") (quoting *Holloway v. United States*, 526 U.S. 1, 6 (1999)).

[39] *See infra* pp. 34-37.

[40] *See supra* pp. 6-8; *see also infra* pp. 35-37.

provision" would render both the reference to §620A and the ISA itself redundant because the scope of that broadened provision would include each of these statutes.

Had Congress wanted to direct the reader to statutes other than those listed in §620A(a), it would have employed a phrase such as "§620A or comparable provisions of law." Congress knows how to use such language and chose not to. It is clear from this that the scope of "any other provision ..." is limited to the provisions listed in §620A(a). It bears pointing out, as we shall see (*infra* I.B.(5)), that this is precisely the construction which Congress explained was its intent in §1083(c)(4) of the NDAA. *See Ali*, 128 S. Ct. 837 (giving support to the plain meaning analysis through reference to subsequent legislation).

In summary, "section 620A of the [FAA]" contains a list of statutes permitting international aid to countries that may be made inapplicable if "that country has repeatedly provided support for acts of international terrorism."[41] The placement of this list immediately before an inherently indefinite noun phrase, the use of nearly identical language in §1503 and §620A(a), and the logic operating within Chapter 5 of the EWSAA[42] together compel the conclusion that the correct and only plain reading of the authority to waive "any other

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[41] 22 U.S.C. §2371(a) (2006).

[42] *See infra* pp. 29–31.

provision of law" is to limit it to §620A and, specifically, to those statutes contained in subsection (a) of §620A.[43]

It is now apparent why *Ali*, 128 S. Ct. 831, is analytically distinct from the instant case. In *Ali*, the phrase that was the subject of the litigation ("[federal] law enforcement officers") is self-contained, which is to say, it comprises a known and finite set of elements. Here, however, the relevant phrase ("any other provision of law that applies to countries that have supported terrorism") refers to an intrinsically indefinite category and it is that indefiniteness which generates the implication that it is restricted by the preceding noun (§620A). *See supra* pp. 16–18. The known and finite nature of the category in *Ali* means that it does not necessarily imply a reference to a preceding restriction. In the above analogy, it would be akin to: "There's the refrigerator. Grab a beer."—as opposed to, "There's the refrigerator, take anything you like."

What further distinguishes this case from *Ali* is the presence of elements in the proximate text which collectively indicate that the proviso must be narrowly construed: that the phrase "any other provision" is embedded in a proviso,[44] that the language in subsection (a) of §620A mirrors that which follows "any other

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[43] *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) ("[E]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue.") (quotation marks and alterations in original omitted) (citation omitted).

[44] *See infra* pp. 34-37.

provision,"[45] and that defining "any other provision" by referring back to §620A(a) gives the executive the option of deciding which sanctions, if any, to leave in place.

Other syntactical indicia tie proviso two to §620A(a). One such indicator is that no punctuation separates the antecedent from the referential phrase.[46] Unlike *Ali*, where the Court relied upon the presence of a comma between two items to indicate that the two items were entirely unconnected, 128 S. Ct. at 839, in our case the absence of such a comma indicates the opposite. That is, the absence of a comma between "section 620A of the FAA" and "or any other provision…" suggests that these two phrases are linked to each other.

The Petitioners, citing *Ali*, place emphasis on the expansive nature of the word "any." Iraq Br. at 23–24, 28. In this case, however, unlike *Ali*, "any" is of no bearing on the issue that needs to be resolved, *i.e.*, making sense of the words "other provision of law that applies to countries that have supported terrorism" in the face of that phrase's intrinsic indeterminacy. Once that meaning is resolved (as, for example, by the plain meaning set forth above), the term "any" makes sense; absent a resolution of what "other provision of law…" means, "any" is utterly unhelpful to understanding the proviso.

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[45] *See supra* pp. 18-19.

[46] *Id.* at 30; Terri LeClercq, *Expert Legal Writing* 87–89 (1995).

With the Petitioners offering no definition of the plain meaning of the statute and the government distending its definition with implications drawn from sources outside the language of the statute itself, Respondents' plain meaning is the only plain meaning. If, however, this Court finds that the statute is ambiguous,[47] Respondents demonstrate in the discussion which follows that the conventions and presumptions of statutory construction, as well as the statute's legislative history, compel the conclusion that proviso two of §1503 does not include §1605(a)(7) of the FSIA.

B. The Exclusion Of The FSIA From Proviso Two Is Compelled By The Conventions And Presumptions Of Statutory Construction And The Legislative History Of §1503.

(1) Conventions Of Statutory Construction Support The Exclusion Of The FSIA From Proviso Two.

The canon *noscitur a sociis* instructs a reader to comprehend words within their context—that is, in harmony with neighboring words in the same document.[48] The canon *ejusdem generis*, a species of *noscitur*, directs the reader of a catch-all term that

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[47] "I agree with the majority that this question of statutory interpretation is close, and I do not suggest that the EWSAA is entirely unambiguous." *Acree*, 370 F.3d at 62 (Roberts, J., concurring in part and concurring in the judgment).

[48] *See* Reed Dickerson, *The Interpretation and Application of Statutes* 233 (1975).

follows more specific terminology to confine the catch-all to items no broader than the specific term.[49]

Petitioners argue that the D.C. Circuit, in *Acree*, improperly relied on the *ejusdem* canon because it does not apply where there is no list from which to extrapolate a common feature. Iraq Br. at 25 (quoting *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006)). This analysis is wrong because §620A provides such a list.[49]

To be exact, §620A of the FAA is an extremely expansive sanction, directing the executive to withhold assistance under four acts: (1) the Foreign Assistance Act itself, which includes 400 pages of individual provisions granting assistance and is the principal means of U.S. aid to foreign nations; (2) the Peace Corps Act; (3) the Export-Import Bank Act of 1945; and (4) the Agricultural Trade Development and Assistance Act of 1954.

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[49] *See id.* at 234 ("Thus, in the phrase 'oaks, elms, and other vegetation,' the term 'vegetation' presumably means trees."); *see also Ali*, 128 S. Ct. at 842 (Kennedy, J., dissenting) ("The *ejusdem generis* canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the 'enumerated categories… which are recited just before it,' so that the clause encompasses only objects similar in nature.") (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

[50] Nonetheless, *ejusdem* is "not limited to those statutes that include a laundry list of items." *Ali*, 128 S. Ct. at 842–43 (Kennedy, J., dissenting) (citing *Norfolk & W. Ry. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991)).

Harrison v. PPG Industries, 446 U.S. 578 (1980), relied on by Petitioners, actually demonstrates, albeit by distinction, why use of the *ejusdem* canon is appropriate here. The relevant phrase in *Harrison* was "any other final action [of the EPA]," *id.* at 587, and the issue was whether this phrase included all final actions of the EPA or just those final actions of the EPA that involved administrative proceedings reflecting notice and an opportunity for a hearing. *Id.* The Court there declined to employ *ejusdem generis* because the list of statutes preceding the phrase "any other final action" was in fact not limited to those providing for notice-and-hearing proceedings and because there was "no indication whatever that Congress intended the limiting construction" of the phrase. *Id.* at 588–89 (citation omitted).

Here, in contrast, the list of statutes enumerated in §620A—referenced at the beginning of proviso two—all involve foreign assistance. Moreover, the structure of the statute, the many references to foreign assistance provisions, and the legislative history provide numerous indications that Congress intended the more limited construction of "any other provision of law."

Referring back to the discussion of *Ali*,[51] it is to be observed that in *Harrison* and *Ali* the phrases in question ("final action [of the EPA]" and "[federal] law enforcement officer," respectively) describe a finite set of known elements, and the task was to determine which of those elements was included within the statute. That is not the case here: "any other provision of law that

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[51] *See supra* p. 21.

applies to countries that have supported terrorism"—the relevant set—does not describe a conventional or even readily determinable class of elements.[52]

It is this core indeterminacy which distinguishes the phrase in this case from the phrases in *Harrison* and *Ali*,[53] and it is this core indeterminacy which leads the reader (including this Court), as a matter of common sense and as captured in the rules of linguistic coherence, to look to the preceding language in making sense of the phrase.[54] Once this is done, the key is found: a finite and identifiable, although expansive, set of statutes referenced through the citation of §620A, which give clarity to the phrase and which are consistent with the intratextual structure and logic of EWSAA §1503. Whether this Court applies the plain meaning analysis in the first section of this brief and concludes that the phrase "any other provision" is limited to the statutes in §620A(a); or the *ejusdem* analysis and determines that "any other provision" comprises statutes of like kind to those in §620A(a); or the *Acree* court's *noscitur* canon, the result is the same—proviso two does not reach the FSIA.

The *Acree* court, in its *noscitur* discussion, correctly distinguished between the FSIA and the statutes listed in the Iraq Sanctions Act on the basis that the latter

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[52] *See supra* p. 21.

[53] In *New York v. FERC*, the plain meaning of the statute was not challenged; rather, the State of New York asked the Court to set aside that meaning based on legislative history, policy, and presumptions. 535 U.S. 1, 17 (2002).

[54] *See supra* pp. 16-18.

were of a different kind, in that the primary purpose of the statutes in the ISA was to impose sanctions and embargoes on Iraq. 370 F.3d at 60. By contrast, the FSIA terrorism exception grows out of the recognized need to compensate individuals who have been victims of brutalities—such as torture, murder, and hostage taking—in violation of long-settled international norms. Compensation to victims may have the remote effect of dissuading a country from engaging in acts of inhumanity, but it is quite simply not within the same genus as an embargo or the funding of military intervention. The terrorism exception to the FSIA is no more a "sanction" than the Federal Tort Claims Act.

To be more precise with this categorical distinction, sanctions are temporary measures understood as a "specific penalty enacted in order to secure obedience. . . ."[55] Once obedience is obtained the sanctions are lifted.[56]

Sanctions have taken different forms (boycotts, blockades, and embargoes) but all share a common aspect: they are imposed on other nations with the aim of correcting immediately violations of international

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[55] *Royal Institute of International Affairs*, *International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* 9 (1938) (quoting the *Oxford English Dictionary*).

[56] *See*, *e.g.*, Carina Staibano, *Trends in UN Sanctions: From Ad Hoc Practice To Institutional Capacity Building*, *in* Peter Wallensteen & Carina Staibano, *International Sanctions* 41 (2005); Mikael Briksson, *EU Sanctions: Three Cases of Targeted Sanctions*, *in International Sanctions* 110, 112, 146.

agreements or inimical conduct.[57] Once sanctions effect the desired change in a nation's acts, sanctions are removed. This is the essential nature of "sanctions" as that term has been used in the historical discourse of jurists, scholars, diplomats, and legislators and as understood in the international relations context.[58]

Statutes imposing civil liability (the Federal Tort Claims Act, for example) or reparations statutes, by contrast, are by their nature backward-looking compensatory measures "that seek to make up…for the harms endured" by victims, rather than altering a nation's current behavior.[59] The liability endures despite changes in government and policy.

Congress, when it amended the FSIA with the terrorism exception, made clear that countries which have supported terrorism remain responsible for their acts despite changes in behavior resulting in their removal from the State Department list.[60] Thus, the

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[57] *See* Peter Wallensteen, *A Century of Economic Sanctions: A Field Revisited*, 1 Uppsala Peace Research Papers (2000).

[58] *See* Hugo Stokke & Arne Tostensen, *Human Rights in Development* 85 (2001) ("International sanctions, in general, may be defined as the temporary abrogation of normal state-to-state relations…with a view to inducing or pressurising the targeted state into changing specified policies or modifying behaviour in certain spheres of activity in suggested directions.").

[59] Pablo De Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, *in The Handbook of Reparations* 1 (2006).

[60] *See* 28 U.S.C. §1605(a)(7)(A) (2006); NDAA §1605A(a)(2)(A)(i)(I).

terrorism exception to the FSIA is more like a statute imposing civil liability (the Federal Tort Claims Act) or a reparations statute than it is like a sanction.

To this should be added another reason why denying federal jurisdiction over pending cases is different from removing the sanctions listed in the ISA: the burden of extinguishing pending cases would fall on a small group of individuals (those U.S. soldiers and civilians who were tortured). Since the distribution of burdens for funding war is an issue long discussed in law, political philosophy, and public debate,[61] the suggestion that the second Gulf War was to be funded by sacrificing the claims of American soldiers and civilians who were tortured would surely have drawn the attention of, and caused debate within and without, Congress.

The *noscitur* canon also compels the conclusion that §1503 did not authorize the President to remove federal court jurisdiction over suits against Iraq. Section 1503 is contained in Chapter 5 of the EWSAA, which is entitled "Bilateral Economic Assistance, Funds Appropriated to the President." 117 Stat. 572. The provisions of Chapter 5 are dedicated solely to the purpose of its title—to provide U.S. appropriations

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[61] *See*, *e.g.*, Immanuel Kant, *Theory and Practice pt. II* (1793), *in Kant Political Writings 73*, *79 n.** (2d enlarged ed., H. Reiss ed., H.B. Nisbet trans., Cambridge University Press 1991) (discussing the need to proportionately impose a war tax on all people because "an unequal distribution of burdens can never be considered just"), *available at* http://www.sussex.ac.uk/Users/sefd0/tx/tp2.htm; William Sweet, *Philosophical Theory and the Universal Declaration of Human Rights* 158–59 (2003).

through the President to Iraq and other countries, with an emphasis on allies who were aiding the United States in the war effort. *See* EWSAA, ch. 5, 117 Stat. 572–81.

Chapter 5 of the EWSAA contains six "general provisions" that apply, unless otherwise stated, to the chapter as a whole; §1503 is one of those "general provisions." *See* EWSAA §§1501–1506, 117 Stat. 578–81. These "general provisions" impose conditions upon the appropriations made throughout Chapter 5.

For example, §1502 provided that "[a]ssistance or other financing under this chapter may be provided for Iraq notwithstanding any other provision of law," 117 Stat. 578, subject to certain provisos. And §1506 directed the President to provide periodically until September 30, 2004 (also the original date of §1503's sunset) "[c]ost estimates for carrying out the proposed activities" "related to post-conflict security, humanitarian assistance, governance, and reconstruction in Iraq that are undertaken as a result of Operation Iraqi Freedom" and "[t]he source of the funds that will be used to pay such costs." [62]

The general provisions provided explicit instructions for the distribution of U.S. financial and operational assistance to Iraq and U.S. allies within the framework of the war. In order to accomplish this expeditiously, Congress passed the EWSAA quickly and provided end-runs around complicated sanctions laws that prevented the United States from funneling funds into Iraq. The purpose of Chapter 5 was clearly confined to providing

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[62] 117 Stat. 580, 581.

taxpayer dollars to aid the war and reconstruction. There is absolutely no indication that Congress intended, in the midst of this emergency war-funding statute, to remove federal court jurisdiction over personal injury suits.

Petitioners' and the government's interpretations of proviso two disregard the proviso's placement in the overall statutory scheme and sever the second half of the proviso from: the first half of the proviso; the enacting clause of §1503; and the text of the EWSAA as a whole. In so doing, Petitioners and the government disobey "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted).

(2) Presumptions Of Statutory Construction Support The Exclusion Of The FSIA From Proviso Two.

Petitioners' argument amounts to the assertion that Congress intended to remove federal court jurisdiction via §1503 by implication, since, of course, they do not contend that Congress ever specifically mentions jurisdiction or the FSIA in the EWSAA. But this Court has disapproved of implied repeals, especially when purportedly found in appropriations provisions.

> As a general rule, repeals by implication are not favored. This rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill. Indeed, the rules of both

> Houses limit the ability to change substantive law through appropriations measures. *See* Senate Standing Rule XVI(4); House of Representatives Rule XXI(2).

United States v. Will, 449 U.S. 200, 221–22 (1980) (citations and quotations omitted).[63] When Congress repeals jurisdiction, it uses language leaving no doubt of that fact. *See*, *e.g.*, *Bruner v. United States*, 343 U.S. 112, 113 (1952) ("The district courts shall not have jurisdiction under this section.…" 65 Stat. 710, 727 (Oct. 31, 1951)). Indeed, the same Congress that passed §1503 amended 48 U.S.C. §1424-2 to withdraw "'jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had'," rendering the Ninth Circuit without jurisdiction over a pending writ. *Santos v. Guam*, 436 F.3d 1051, 1052 (9th Cir. 2006) (citation omitted).

Here, no intent to repeal jurisdiction, let alone a clear one, can be reasonably deduced from the language of a statute which emits not a single word about U.S. jurisdiction and U.S. courts and does not mention the FSIA.

Petitioners argue that when foreign relations are implicated, deference to the President is the norm. Iraq Br. at 19. But deference is due a President only when he is exercising powers within the scope of his authority. There is no deference to his interpretation of the

[63] *See TVA v. Hill*, 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication…applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.").

statutory or constitutional texts which define the boundaries of that authority.

There is no *Chevron* issue in this case. Whether *Chevron* requires the courts, when determining the boundaries of an agency's authority, to defer to an agency's views on that question, the case before this Court involves a preceding and more fundamental question: whether the courts even have jurisdiction to determine the question of deference. Logically, if there is no jurisdiction, the courts are not allowed to get to the question of whether to defer or not to defer to the Executive or administrative agencies as to the parameters of an agency's authority. This Court, no court, has ever granted the Executive or administrative agencies deference on the more elemental and far-reaching question. Even if *Chevron* were somehow implicated, since the issue in this case is the scope of the jurisdiction of the courts, the relevant "agency" (the expert body) would be the courts themselves.

Also, it is the function of the courts, "applying no more than the traditional rules of statutory construction," to determine what authority was delegated to the President. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). *See City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.17 (2d Cir. 2006) ("[T]he executive branch's views on matters implicating relations with foreign states are entitled to consideration. However, 'interpretation of the FSIA's reach [is] a pure question of statutory interpretation'… and so the United States' views 'merit no special deference.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (citations omitted)). Congress

in enacting the FSIA and codifying the bases for jurisdiction over a foreign sovereign, and expressly removing the authority to determine the justiciability of claims from the Executive's purview, has removed any deference that might be given to the President's views as to the boundaries of FSIA jurisdiction. *See infra* note 92; *see also Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla. 1999) ("The President's decision to exercise his waiver is given great deference by this Court; however, his interpretation of the breadth of that waiver cannot belie the legislative authority from which it stems.")

(3) The Subordinate Nature Of Provisos Compels The Exclusion Of The FSIA From Proviso Two.

This Court has held that statutory language phrased as a proviso, although capable of introducing independent legislation, is presumptively confined in scope to that of the principal clause to which it is attached. *United States v. Morrow*, 266 U.S. 531, 535 (1925); *accord Acree*, 370 F.3d at 52–53. In this case the presumption is bolstered by the fact that the relevant language of the proviso ("any other provision ...") occurs after a specific noun (§620A), which in turn references numerous statutory provisions (as contained in the list found in subsection (a) of §620A). This Court has rarely, if ever, when confronted with such a text, abandoned the above presumption.[64]

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[64] In *Alaska v. United States*, the language to be reconciled was contained in a separate proviso, not the second half of a single proviso. 545 U.S. 75, 77 (2005). *McDonald v. United States*, (Cont'd)

Furthermore, the proviso was located in an appropriations bill, which further supports the conclusion that the proviso relates to spending, not federal court jurisdiction.[65] This is confirmed by the memorandum from the Office of Management and Budget ("OMB"), which prepared the appropriations bill and which explained that §1503 concerned embargoes, arm sales, exports, and foreign assistance.[66] If Congress had wanted to eliminate jurisdiction, it would not have done so in the second proviso in the General Provisions section of Chapter 5 ("Bilateral Economic Assistance, Funds Appropriated To The President") of an appropriations bill without at least a single mention of U.S. courts, jurisdiction, or the FSIA.

Finally, each of the five substantive provisos of §1503 is directly related to a specific provision of the ISA. *See supra* pp. 4–8; *see also Acree*, 370 F.3d at 53. In response to this observation of the *Acree* court, the government and Petitioners both counter that proviso four—which suspends the sanction imposed by §307 of the FAA—is wholly unrelated to the ISA. *Compare Acree*, 370 F.3d at 53 *with* U.S. Br. at 14–15 and Iraq Br. at 26–27. The government and Petitioners are quite mistaken on this:

(Cont'd)

279 U.S. 12 (1929), involved the reconciliation of two separate provisos. *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002), involved the interpretation of a separate enumerated exception following a general policy. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), and *Ali* did not involve provisos.

[65] *See supra* pp. 30-31.

[66] Resp'ts Opp. Cert. App. 22a.

The connection between proviso four and the ISA begins with §620A of the FAA. That section bars countries which have supported terrorism from receiving assistance under all of the provisions of the FAA[67] and that, *ergo*, includes funds provided under Part I, Chapter 3, of the FAA (entitled "International Organizations and Programs"). With the enactment of the ISA in 1990, the President was specifically directed to enforce §620A against Iraq, *thereby depriving Iraq of funds available under Part I, Chapter 3*—codified as §586F(c)(2)(B).[68]

Four years later, in 1994, Congress added Iraq to §307 of the FAA. That section comprises an independent list of nations which are not entitled to funds under Part I, Chapter 3, regardless of whether or not they had supported terrorism. With the addition of Iraq to the §307 list, Iraq was thus triply barred from receiving funds under Part I, Chapter 3: first by its designation as a terrorist state which barred it from receiving any FAA funds, second by the ISA, and lastly by Iraq's inclusion on the §307 list.

The rationale behind proviso four is thus clear: to ensure that Iraq was again able to receive funds under Part I, Chapter 3 of the FAA,[69] it was not enough for

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[67] "The United States shall not provide any assistance under [this Act]…to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism." FAA §620A(a), 22 U.S.C. §2371 (2006).

[68] ISA §586F(c)(2)(B), 104 Stat. 2051.

[69] Approximately 79% of the funds appropriated from Part I, Chapter 3 of the FAA are dispersed to the United Nations Development Program and the United Nations Children's Fund, programs that were desperately needed in Iraq in April 2003. *See* FAA §302, 22 U.S.C. §2222 (2006).

Congress to authorize the President to suspend the ISA (or parts thereof); rather, Congress also had to add a proviso which made it indisputably clear that all three statutory bars to aid to Iraq were being lifted. Thus, while proviso four does not suspend (or authorize suspension of) any specific provision of the ISA—which was unnecessary in light of the broad authority granted to the President by the main clause of §1503 to suspend any provision of the ISA—it clearly relates to the ISA in that it ensures (by lifting the third barrier) that any decision by the President to suspend §586F(c)(2)(B) of the ISA would actually have the desired impact of allowing aid to flow to Iraq under Part I, Chapter 3 of the FAA.

(4) The Legislative History Of §1503 Also Indicates That Congress Had No Intention Of Including The FSIA In Proviso Two.

The United States invaded Iraq on March 20, 2003. Five days later, the President made a request to Congress for emergency supplemental appropriations, primarily in support of operations in Iraq.[70]

In his appeal for congressional approval of "bilateral economic assistance," the President requested the authority to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism." The President attached to his request the letter from OMB,

[70] *See* Letter from President George W. Bush to Rep. J. Dennis Hastert, Speaker of the House of Representatives (Mar. 25, 2003), *reprinted in* H.R. Doc. No. 108-55, at 1 (2003) (Resp'ts Opp. Cert. App. 8a).

which had prepared the appropriations bill, explaining that §1503 "would repeal the Iraq Sanctions Act of 1990," and that it "would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." [71]

The legislative history of the EWSAA demonstrates the objective of §1503: to reverse the sanctions imposed by the ISA, particularly those which barred Iraq from the panoply of necessary aid offered by the FAA, aid that was desperately needed by an unstable, ungoverned country torn apart by a war that was still in the invasion phase. Without §1503, the United States would have lost critical time trying to undo multiple layers of sanctions imposed on Iraq over the prior decade, making it impossible to bring some modicum of stability to the region.[72]

There is no indication anywhere in the legislative history of §1503 that Congress intended to authorize the President to make inapplicable any part of the FSIA. The House Appropriations report states as to §1503 only that it authorizes "the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq." H.R. Rep. No. 108-55, at 30 (2003). Also, the "Changes in the Application of Existing Law" section required by House rules fails to

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[71] Resp'ts Opp'n Cert. App. 22a.

[72] *See*, *e.g.*, 22 U.S.C. §2371(c) (2006) (rescission provisions of the Foreign Assistance Act of 1961); 50 U.S.C. app. §2405(j)(4) (2000) (rescission provisions of the Export Administration Act).

mention the FSIA or any provision of the Judiciary Code, despite specifically listing §§620A and 307 of the FAA and more than four pages of other affected laws. *Id.* at 47–48. Similarly, the Senate Appropriations Report states only that "[t]he Committee provides the request for the repeal of the Iraqi Sanctions Act [sic] of 1990, *and other limitations on assistance for Iraq*." S. Rep. No. 108-33, at 21 (2003) (emphasis added). As to the Conference Report, only the Iraq Sanctions Act and §§620A and 307 of the FAA are identified as the affected authorities: "section 1503…would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq." [73]

(5) Congress Enacted Its Intent, In §1083(c)(4) Of The NDAA, To Exclude The FSIA From The Compass Of Proviso Two.

If there were any doubt that Congress never intended to remove FSIA jurisdiction in section 1503 of the EWSAA, Congress affirmatively dispelled it when it enacted §1083(c)(4) of the NDAA (entitled "Preserving The Jurisdiction of The Courts"):

> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108–11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or

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[73] H.R. Conf. Rep. No. 108-76, at 76 (2003).

> the removal of the jurisdiction of any court of the United States.[74]

Section 1083(c)(4) thus dispenses with Petitioners' and the government's assertion that Congress removed the jurisdiction of the federal courts under the FSIA.

This Court should reject Petitioners' argument that subsequent legislative history is given little weight in interpreting prior enactments. Iraq Br. at 35. First, §1083(c)(4) is subsequent *legislation*, not subsequent legislative history. Section 1083(c)(4) was duly enacted, signed into law, and specifically concerned the very meaning of §1503. "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81 & n.8 (1969).

There is a long tradition in the United States and England of legislative enactments in which a legislature mandates the manner in which a prior statute is to be interpreted. Unlike mere statements by individual legislators or more informal sorts of subsequent legislative history, such legislative enactments (referred to as "declaratory legislation") are entitled to "great weight."[75] Declaratory legislation is not simply an historic curiosity which the courts, at their discretion, are permitted to use or dismiss as evidence of legislative intent but rather are authoritative mandates from Congress. For this reason, the cases to the contrary relied on by Petitioners are inapposite.

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[74] NDAA §1083(c)(4), 122 Stat. 343.

[75] *See Loving v. United States*, 517 U.S. 748, 770 (1996).

Moreover, in this case, §1083 *controls* the interpretation because it definitively answers the question of whether §1503 reaches the FSIA.[76] Unlike *Mackey*, an example cited by the Petitioners, where Congress later legislated for opaque reasons and without accompanying explanation, here, Congress left no room for conjecture as to the answer to the dispositive question: the scope of §1503 vis-à-vis the FSIA.

Petitioners also suggest that subsequent legislation is not entitled to great weight, citing cases which concern consideration by Congresses of legislation passed many years earlier. Here, by contrast, 79% of the legislators in the 108th Congress also served in the 110th Congress, less than five years later.[77]

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[76] *See Stockdale v. The Ins. Cos.*, 87 U.S. (20 Wall.) 323, 331 (1873) ("Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated."); Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CRS Rept. for Cong. No. 97-589, at 45 (Aug. 31, 2008) ("If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied."), *available at* http://opencrs.com/.; Thomas M. Cooley, *Constitutional Limitations* 50–51 (7th ed. 1903).

[77] Senators (79/100; 79%), Representatives (346/440; 79%), Total (425/540; 79%). *Compare* Congressional Directory for the 108th Congress 307–312 *with* Congressional Directory for the 110th Congress 305–309.

Petitioners argue that even if §1083(c)(4) detracts from their interpretation of §1503, the President waived §1083(c)(4). Such a waiver would, however, have no effect on the manner in which this Court should interpret the EWSAA. To begin with, the President's rationale for his waiver of §1083 (*i.e.*, that it served the immediate interests of U.S. foreign policy in Iraq) relates to the exigencies at the time of the waiver and has no logical relationship to the accuracy of Congress' declaration with respect to its own earlier intention when it adopted the EWSAA. The force and accuracy of Congress' analysis of the history of its own intentions cannot be waived.

Lastly, the President could not have waived §1083(c)(4): the President was only authorized to waive provisions that he determined "affect[ed]" Iraq or any agency or instrumentality thereof. NDAA §1083(c)(4). Section 1083(c)(4) affects the jurisdiction of U.S. courts; if by extrapolation this could, hypothetically, affect Iraq, then that reading is too strained.[78]

C. The Authorities Of The EWSAA Lapsed On September 30, 2005.

The plain language of the EWSAA requires its authorities to sunset. Section 1503 provides that:

> [T]he authorities contained in this section shall expire on September 30, 2004, or on the

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[78] *Accord United States v. Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

> date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.[79]

Congress extended the expiration date of §1503 one year to September 30, 2005.[80] Thus, absent further extensions, the authorities that §1503 granted to the President expired with the statute.

The D.C. Circuit declared this plain meaning of the sunset provision of §1503: "If the United States were correct in its interpretation of §1503, then this sunset provision would mean that, absent intervening events, §1605(a)(7) would once again be available as a basis of jurisdiction after September 30, 2004." *Acree*, 370 F.3d at 57.

Indeed, Chief Justice Roberts, then on the D.C. Circuit, read the plain language of the sunset provision as evidence of §1503's emergency and temporary nature. *See id.* at 61–62 (Roberts, J.). The authority provided to the President must have been temporary because, as then-Judge Roberts noted, "a sunset provision…is intended to buy time for fuller consideration of the issues…." *Id.* at 62. Moreover, he noted that "it hardly needs saying that the sunset provision in Section 1503 applies…to all of that section." *Id.* There was no doubt, he emphasized, that congressional inaction would cause the ISA to "return

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[79] EWSAA §1503, 117 Stat. 579.

[80] Pub. L. No. 108-106, §2204(2), 117 Stat. 1230.

to full strength on September 30, 2004." *Id.* This plain meaning, that a power granted by statute does not survive the expiration of the statute itself, is the only allowable interpretation of the sunset provision. Nor would the courts give deference to the Executive's interpretation of the termination of his authority, any more than they would defer to his definition of his authority.

The ISA continued the embargo on Iraq, which was imposed three months prior by Executive Orders 12722 and 12724. The ISA specified the penalties for violations of the embargo instituted by the President's executive orders, including denying FAA assistance to countries not in compliance.[81] The purpose of the ISA was to provide details of the penalties for violating the pre-existing sanctions and the embargo imposed by the August 1990 Executive Orders and the Secretary of State's designation of Iraq as a state sponsor of terrorism.[82]

By invoking §1503 of the EWSAA, the President suspended §620A of the FAA, as well as the ISA, thus suspending the penalties dependant upon the August 1990 Executive Orders and Iraq's designation as a state sponsor of terrorism. These suspensions were not permanent; the Executive took the steps necessary to remove permanently the sanctions underlying §620A and the ISA by issuing Executive Order 13350 and

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[81] ISA §586C, 104 Stat. 2048.

[82] *See supra* notes 1 & 9.

revoking Iraq's designation as a terrorist state.[83] Had the Executive not revoked the August 1990 Executive Orders and Iraq's terrorist state designation—the substantive sanctions without which the ISA's penalties would have been ineffectual—those penalties would have come back into force upon sunset.

The United States has advanced a strained, inconsistent, and constitutionally untenable interpretation of this plain language by suggesting that somehow the effect of the President's exercise of his temporary authorities under §1503 is perpetual and unending. *See* U.S. Br. 19 ("But the phrase 'make inapplicable' in the second proviso of EWSAA section 1503 connotes a *permanent* effect of the President's action."). But if Congress wished to "permanently make inapplicable" certain laws with respect to Iraq, Congress would have employed a commonly used term of art in the legislative arena: "repeal."

Further, the government's argument not only flies in the face of the plain language of the sunset clause, but also is inconsistent with the whole structure of §1503. That section, in essence, gave the President the power to "suspend" the ISA and other enumerated statutory provisions. "Suspend," of course, is very different from "veto" or "nullify," and the suspension logically can last only as long as the authority to suspend is in effect. Once that authority lapses (with the sunset), the suspension necessarily lapses with it.

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[83] Exec. Order No. 13350, 69 Fed. Reg. 46055 (July 30, 2004); *see* U.S. Department of the Treasury, Office of Foreign Assets Control, *What You Need to Know About U.S. Sanctions* (Nov. 30, 2004) ("On July 30, 2004, the President issued a new Executive Order 13350 effectively lifting the sanctions against Iraq.…").

In addition, the government's interpretation of the sunset provision, effectively giving the President the authority and discretion to permanently make inapplicable (a.k.a. repeal) the jurisdiction of the federal courts under the FSIA, would violate the Presentment Clause (Art. I, §7, cl. 2 & 3). Though the Constitution, in Article I, section 7, contemplates the President playing a role in the legislative process, "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton*, 524 U.S. at 438. Thus, even had Congress wanted to give the President the authority to permanently repeal a jurisdictional statute, the Presentment Clause would not allow it to delegate such authority. *Id.* at 446.

Further, in *Field v. Clark* and related cases, this Court identified three specific and historical prerequisites for Congress to delegate the authority even to suspend *temporarily* the operation of a statute. *Id.* at 438–42 (citing *Field v. Clark*, 143 U.S. 649 (1892)).

First, the exercise of a suspension power must be "contingent upon a condition that did not exist" at the time Congress delegated the authority. *Id.* at 443. Second, "when the President determined that the contingency had arisen," he "had a duty to suspend" the specific statute; there was no, and could be no, discretion of the President regarding whether to do so. *Id.* at 443–44. Finally, by suspending the statute, the President must be "executing the policy that Congress had embodied in the statute." *Id.* at 444. Here, the President's actions met none of these requirements.

That the instant case may have a tangential effect on foreign relations does not remove it from the constraints of *Clinton* and *Field*. Indeed, the Tariff Act of 1890 at issue in *Field* (from which this Court derived the three criteria above) directly pertained to foreign affairs in authorizing the President to impose retaliatory tariffs on specific foreign nations who unreasonably taxed U.S. exports. *Id.* at 442. *Field* itself thus makes clear that these criteria apply to any delegated congressional authority to suspend a statute regardless of whether the authority affects foreign affairs.

The United States' interpretation of the sunset provision would also render §1503 an unconstitutional delegation of legislative authority.[84] This Court differentiates between lawful and unlawful delegation: "'[t]he true distinction'…'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law'." *Field v. Clark*, 143 U.S. at 693–94 (citation omitted).

A repeal is tantamount to the power to make law.[85] In this case, if Congress conferred upon the President the discretion to repeal permanently the jurisdiction of

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[84] *See generally* Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine In* Clinton v. City of New York: *More than "A Dime's Worth of Difference*," 49 Cath. U. L. Rev. 337, 341–42 (2000) (citing *The Federalist* No. 47, at 303 (James Madison)).

[85] *See INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.").

the federal courts with respect to suits brought under the FSIA, this would be unconstitutional because Congress cannot delegate the core function of determining the jurisdiction of the courts.[86]

Even if it were assumed that proviso two of §1503 reached the FSIA and was not terminated under the sunset proviso (assumptions with which, as should now be relatively clear, Respondents have some objection), pending cases would still survive. The presumption applicable to the EWSAA regarding retroactivity is the foundational presumption against retroactive application absent an express statement by Congress to the contrary. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). The holding in the *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which this Court limited to the "*sui generis*" circumstance of a statute which directly addresses the sovereign immunity of foreign nations, is of no relevance to the instant case; the

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[86] "More than one circuit court has expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 763 (2d Cir. 1998) (citing *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) ("[I]t is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction.…"); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) ("[A] potential constitutional concern" was Congress "delegat[ing] such a core legislative function as its control over federal court jurisdiction to any agency or commission.")). *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 18 (D.D.C. 2005) (stating the Executive "'can neither grant nor curtail federal court jurisdiction.'") (quoting *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).

EWSAA is an emergency appropriations act, with no chief part even tangentially related to the jurisdiction of the U.S. courts. This Court has also held that retroactivity is denied, again absent language to the contrary, when plaintiffs would have no alternative forum in which to file their claims. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006). Respondents in this case have no alternative forum. Moreover, the terrorism exception to the FSIA specifically provided for damages—such as solatium—which might not be available under a plaintiff's state's law but which are available under federal law, and thus abrogation of the FSIA would impair, *inter alia*, that right.[87]

While at the time of *Acree* the court called the question "close," the majority identified a considerable foundation for its opinion, including the plain meaning ("None of these provisions remotely suggests any relation to the jurisdiction of the federal courts." 370 F.3d at 54–55); the legislative history (stating "concern" in legislative history "with eliminating statutory restrictions on aid and exports needed for the reconstruction of Iraq" was "easily understood." *Id.* at 55); the temporal scope of §1605(a)(7) compared to §1503, buttressed by the sunset proviso (*id.* at 56); and §1503's meaning in the context of the other provisions of the EWSAA and its legislative history (*id.* at 57). It is even clearer now, five years removed from the exigencies of 2004, and in light of the fact that the President never sought and Congress never gave any clarification of the scope of §1503 authority—except in §1083(c)(4)—that *Acree* was correctly decided.

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[87] *See* 28 U.S.C. §1605 note; NDAA §1605A(c).

II. By Its Clear Terms, The NDAA Has No Effect on The Courts' Jurisdiction Over Respondents' Claims.

Petitioners argue that even if the EWSAA did not deprive courts of jurisdiction over Respondents' suits, the NDAA did. But the *Simon* court and the United States government amply explain why the NDAA has no effect on Respondents' claims.

First, the language of the NDAA makes clear that the amendments inserted by §1083 (*see supra* pp. 8–10) have no application to cases pending under §1605(a)(7).

Section 1083(c), entitled "Application to Pending Cases," provides that "[t]he amendments made by this section shall apply to any claim arising under section 1605A." §1083(c)(1). Therefore, the plain meaning of §1083 dictates that these amendments are not applicable to claims under §1605(a)(7), as those claims could not have arisen under §1605A.

The amendments under §1083 offer a new basket of rights[88] to plaintiffs filing suit under the terrorism exception to foreign sovereign immunity. Congress afforded existing §1605(a)(7) claimants the opportunity to invoke §1605A's new rights by either converting their claims or filing related actions. NDAA §1083(c)(2) and (3). In order to take advantage of these rules of transition, claimants must invoke §1605A within 60 days of the latter of either (a) the date of entry of judgment

[88] *E.g.*, new federal cause of action (§1605A(c)); barring of certain legal defenses (§1083(c)(2)(B)); a lien of *lis pendens* on an expanded class of properties (§1605A(g)); and enhanced attachment and execution provisions in §1083(b).

in the original act, or (b) the date of the enactment of the NDAA. *See id*.

But Congress did not *require* that §1605(a)(7) plaintiffs convert their claims to §1605A claims. Respondents have neither converted nor re-filed their claims under §1605A. Petitioners' position, that "Congress expressed no such intent to preserve Section 1605(a)(7) for these cases," defies logic: Congress surely did not intend to toss aside claimants who chose to forego the opportunity to convert or re-file under §1605A. Iraq Br. at 40. Nor did it intend to prevent cases from proceeding under §1605(a)(7), as evidenced by its decision to allow claimants to invoke §1605A no later than the latter of the date of judgment or the date of enactment. There would have been no need to include the date of judgment unless a §1605(a)(7) judgment could be entered after the enactment of §1083.

Finally, §1083(d)(1), entitled "Applicability to Iraq," proves that the waiver was limited, as Congress intended, to preventing claimants against Iraq from attaining the new bundle of §1605A rights. Section 1083(d)(1) limited the President's ability to waive any provision of "*this section* with respect to Iraq." [89] This point was emphasized by the Chairman of the House Judiciary Committee, John Conyers:

> It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this

[89] NDAA §1083(d)(1) (emphasis added).

> bill; by its clear terms, it does not extend to current law. There is ongoing litigation… under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.[90]

From the above, it is to be concluded that the NDAA does not divest the courts of jurisdiction over the instant claims.

III. Public Policy Compels The Exclusion Of The FSIA From Proviso Two.

Petitioners argue that because the Executive prior to the enactment of the FSIA determined whether foreign nations were immune from suit, the Executive should still have that authority now. Iraq Br. at 50-52, 55-57. But the FSIA was enacted for the very purpose of bringing an end to the uneven and inherently political process by which the Executive determined and conferred immunity.[91]

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[90] 154 Cong. Rec. E46, E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers).

[91] *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). "Not surprisingly, the governing standards were neither clear nor uniformly applied.… In 1976, Congress passed the (Cont'd)

Further, in the terrorism exception, §1605(a)(7), Congress made the measured judgment, notwithstanding past executive authority over the determination of immunity, that even if a country were to be removed from the terrorism list, it would still not have immunity for its past terrorist acts.[92] Congress made this calculated adjustment to the FSIA because of the critical importance of compensating victims and their families.[93]

Petitioners further argue that the new government of Iraq should not be responsible for the liabilities of the past government. This position is inconsistent with the fundamental principle of international law that a

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(Cont'd)

Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that…decisions are made on purely legal grounds and under procedures that insure due process,' H.R. Rep. No. 94-1487, p. 7 (1976)." *Id.* (citation omitted) (alteration and ellipsis in original).

[92] *See* §1605(a)(7)(A) (immunity based on status of country at time acts occurred); *Kilburn v. Islamic Republic of Iran*, 441 F. Supp. 2d 74, 76 (D.D.C. 2006) ("Because [Libya] was a state sponsor of terrorism at the time the alleged acts occurred, the court has jurisdiction pursuant to the FSIA.…"), *summarily aff'd*, No. 06-7127 (D.C. Cir. Oct. 19, 2006) (citing *Acree v. Republic of Iraq*, 370 F.3d 41, 56 (D.C. Cir. 2004) (stating country is still amenable to suit for acts that took place prior to the restoration of its sovereign immunity)).

[93] *See*, *e.g.*, 139 Cong. Rec. 8344 (1993) (statement of Sen. Specter) ("This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence" by "allow[ing] U.S. citizens…to protect their interests and seek compensation for the harm done to them.").

state's liability is not erased by changes in government.[94] It is also inconsistent with Iraq's (and the United States')[95] treaty obligations.[96]

In sum, liabilities arising from state-sponsored torture are the legal responsibility of the state, and resolution of victims' claims is a necessary and common facet of normalization, just as is resolution of outstanding commercial debt.[97]

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[94] *See* Restatement (Third) of Foreign Relations Law §207 (1987); Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 Duke J. L. & Contemp. Probs. 7, 10–11 (2007) (government succession involves a change in government, or even a fundamental change in the structure of state authority, but it does not change the state's international legal personality; "the regime changes in Afghanistan and Iraq in the twenty-first century are examples of government and not state succession.") (citations omitted). *See also supra* p. 28.

[95] The United States has a mandatory obligation under Article 131 of the Third Geneva Convention to not "absolve" a torturing state of "any liability" for the torture of POWs. Convention (III) relative to the Treatment of Prisoners of War, Geneva, art. 131, August 12, 1949.

[96] This includes Iraq's treaty obligations under the Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, and Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, which Iraq signed on Feb. 14, 1956, http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P, and the International Convention Against the Taking of Hostages, which Iraq signed on October 14, 1980, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=367&chapter=18&lang=en.

[97] Iraq resolved nearly $20 billion in commercial debt by 2006, in addition to sovereign debt. Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief*, CRS Rept. for Cong. No. RL33376, at CRS-9-10 (Mar. 31, 2008), *available at* http://opencrs.com/.

Secretary of State Hillary Clinton as part of her confirmation hearing also explicitly recognized that resolution by Iraq of the particular claims at issue is "a priority." [98] Secretary Clinton has also pointed out that Iraq has used these claims to get protections from the Security Council.[99]

Iraq has also demanded compensation for injured citizens, seeking, in one example, $136 million for the families of injured victims of military contractor Blackwater.[100] The United States has been instrumental in this reparations process, not only for Kuwaitis, but also for Iraqi victims of the Baathist regime.[101] By April

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[98] Answer of Secretary of State-Designate Hillary Clinton to Questions for the Record Submitted by Sen. Robert Menendez to the Senate Foreign Relations Committee (dated Jan. 13, 2009), *in* e-mail from Emily Barnes, Senate Foreign Relations Committee to Eva Tarnay, Legislative Librarian, Steptoe & Johnson LLP (Mar. 17, 2009 11:16 am EST) (App. B at 12a).

[99] *See id.* ("Iraq committed to work to settle existing claims from the Saddam era," which would include the claims at issue, "in its request to the Security Council to extend the protections for an additional year for the Development Fund for Iraq (DFI) and Iraqi oil and gas exports and revenues, including protections from legal attachments." Secretary Clinton further noted that "Foreign Minister Zebari also affirmed that the Government of Iraq was fully committed to resolving all legitimate claims and complying with its obligations under international law.").

[100] *See Iraq Demands $136M Blackwater Payout* (CBS television broadcast Oct. 8, 2007), http://cbs2.com/national/blackwater.iraq.united.2.340902.html.

[101] *See* Amb. Bremer Announces Former Regime Victims' Compensation Fund (May 26, 2004), http://govinfo.library. unt.edu/cpa-iraq/transcripts/20040526_bremer_compensation. html.

2007, it was estimated that the families of more than 500 Iraqi civilians killed by U.S. soldiers had requested compensation and, at that time, a third of those were compensated.[102]

At bottom, the handful of claims of torture and kidnapping victims simply will not upset the U.S.-Iraq alliance.

IV. The "Hybrid Veto" Is A Constitutional Nullity.

On December 19, 2007, Congress presented the President with the original NDAA (H.R. 1585), which did not contain a waiver for Iraq. On December 28, 2007, President Bush issued a "Memorandum of Disapproval" stating that "[i]n addition to withholding [his] signature and thereby invoking [his] constitutional power to 'pocket veto' bills during an adjournment of the Congress," he was also sending the bill back to the House for purposes of a contingent return veto—"to avoid unnecessary litigation about the non-enactment of the bill" that resulted from his "withholding approval."[103]

Two concerns are raised by this and the other protective returns: first, the procedure is "flagrantly, even outrageously, extraconstitutional";[104] and second,

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[102] *See* Human Rights Watch, Iraq: US Data on Civilian Casualties Raises Serious Concerns (Apr. 11, 2007), http://www.hrw.org/ (search "casualties raises concerns").

[103] J.A. 411–14.

[104] *See* Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, Presidential Studies Quarterly 728–29 (2001); *see Wright v. United States*, 302 U.S. 583, 596–97 (1938).

it creates uncertainty in the legislative process.[105] It is not within the President's power to invoke and rely on his "pocket veto" authority and then convert it to a second choice—a "return veto"—if the "pocket veto" proves ineffective or illegal. The Constitution provides only for the return veto and, in the instance where Congress is adjourned and return of the bill is not possible, for the "pocket veto."[106]

Since the hybrid veto was first used by President Ford, several bills have been so rejected. Congress has treated the vetoes as return vetoes, and in some cases the President has refused to promulgate the law upon override, underscoring the constitutional infirmity attendant to the contingent return veto.[107]

Central to the problem with the protective return is the president's implicit assertion that if the pocket

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[105] *See id.* ("Protective return vetoes open up a pandora's box of potential problems that simply need not exist."); Louis Fisher, *The Pocket Veto: Its Current Status*, CRS Rept. for Cong. No. RL30909, at CRS-4 (Mar. 30, 2001) ("To allow the pocket veto to expand without limit would create a kind of absolute veto that the framers had rejected.") (citing *Wright v. United States*, 302 U.S. 583, 596–97 (1938)), *available at* http://opencrs.com/.

[106] *See* Spitzer, *supra* note 104, at 728.

[107] *See* Fisher, *supra* note 105, at CRS-7. On five occasions, President Ford returned bills to Congress while at the same time claiming that he had also effected a pocket veto. *Id.* President Bush hybrid vetoed H.R. 2712, 101st Cong., 1st Sess. (1989) and H.R. 2699, 102d Cong., 1st Sess. (1991). President Clinton cast hybrid vetoes on H.R. 4810, 106th Cong., 2d Sess. (2000); H.R. 8, 109th Cong., 2d Sess. (2005); and H.R. 4392, 106th Cong., 2d Sess. (2000). Zero hybrid vetoes were cast in the Nation's first 180 years.

veto is determined to be unlawful—as in the case of the NDAA, where Congress had not gone out of session—then he will rely on the return veto. However, years of litigation can pass before it is determined that the pocket veto is not valid, and Congress, if it had respected the ostensible validity of the pocket veto, would have lost the opportunity to override the return veto.[108] In the meantime, the legal rights of those affected by the invalid pocket veto—such as the plaintiffs against Iraq who would re-file under §1605A—are compromised.[109]

In the case of the original NDAA (H.R. 1585), the President's "pocket veto" was ineffective and unlawful because Congress had not adjourned. The Senate went into *pro forma* session on December 19, 2007, convening at least every third day until the second session officially reconvened for the House on January 15, 2008. S. Con. Res. 61 (Dec. 19, 2007) (adjournment resolution adopted by both chambers). Further, both the House and Senate clerks were available to receive communications from the White House during this period.[110] As such, Congress as a whole had not adjourned and made itself unavailable to consider any veto message from the President, a necessary condition to the use of the "pocket veto."

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[108] All that matters is that it is longer than 10 days before it is determined that the pocket veto is invalid, at which point it is too late to exercise the hybrid return veto, and the bill, like the NDAA, has already become law.

[109] *See* Spitzer, *supra* note 104, at 728.

[110] Kathleen Hunter, CQ Today Online News – Defense (Jan. 2, 2008), *available at* http://public.cq.com/docs/cqt/news110-000002651175.html.

See Wright v. United States, 302 U.S. 583 (1938) (holding that the whole of Congress must adjourn for pocket veto and agents may be appointed to receive veto).[111]

Because both the original and revised NDAA became law—the former because it was improperly vetoed by the President, the latter because Congress acted upon the false assumption that the veto was valid—Respondents are not subject to a presidential waiver because the original statute granted the President no such authority. To the anticipated objection that the revised Act superseded the original Act, the response is this: a statute does not supersede a prior statute unless there is evidence of clear legislative intent to do so,[112] and here there is no such intent since Congress, when passing the revised Act, did not assume that the original Act had become law. If Congress had, in fact, known that the original Act had come into effect, Congress would have never enacted the revised §1083.

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[111] "The use of a pocket veto 'is improper whenever a return veto is possible.'" *See* Fisher, *supra*, note 105, at CRS-8 (citing Memorandum from Solicitor General Robert Bork to Attorney General Edward Levi (Jan. 26, 1976), *reprinted in* "H.R. 849," Hearing Before the Subcommittee on the Legislative Process of the House Committee on Rules, 101st Cong., 1st Sess. 127 (1989)).

[112] *See United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) ("[R]epeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest.") (citations and quotations omitted); *supra* section I.B.(2).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS IN *CLIFFORD ACREE, et al. v. JOHN W. SNOW, SECRETARY OF TREASURY* FILED OCTOBER 10, 2003

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5195

CLIFFORD ACREE, *ET AL.*,

Appellees,

v.

JOHN W. SNOW, Secretary of the Treasury,

Appellants

Washington, D.C.
Date: October 3, 2003

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5195

CLIFFORD ACREE, *ET AL.*,

Plaintiffs-Appellants,

v.

JOHN W. SNOW, Secretary of the Treasury,

Defendant-Appellee.

Friday, October 3, 2003
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES SENTELLE, RANDOLPH, AND ROGERS

Appendix A

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS-APPELLANTS:
STEWART A. BAKER, ESQ.

ON BEHALF OF THE DEFENDANT-APPELLEE:
GREGORY G. KATSAS, ESQ.

* * *

[Mr. Katsas]

* * *

of some very significant foreign policy developments growing out of the conflict and the regime change, and it is not impermissible in those circumstances for Congress to identify a closed set of statues and confer on the President a waiver power in order for him in exercising his independent foreign policy authority to respond —

JUDGE RANDOLPH: You're not reading the plain meaning of the statute, though. You come up here and you say this has got a plain meaning. Let me suggest to you that it doesn't. The statute by, if you read it literally, the President could wipe out federal question jurisdiction for Iraq.

MR. KATSAS: I think —

JUDGE RANDOLPH: Couldn't it?

MR. KATSAS: No, I don't think —

JUDGE RANDOLPH: Is that a statute that applies to, is 28 U.S.C. 13 whatever, is that a statute that applies to countries that have supported terrorism?

MR. KATSAS: I think the best —

JUDGE RANDOLPH: It is, isn't it?

MR. KATSAS: The best reading —

JUDGE RANDOLPH: No, answer my question. Does that, does federal question jurisdiction, is that a statute that applies to countries that supported terrorism?

MR. KATSAS: That statute applies to a much larger category of entities, including but not limited to countries —

JUDGE RANDOLPH: But it does apply to countries that supported terrorism, doesn't it?

MR. KATSAS: That's true, but —

JUDGE RANDOLPH: All right. Well, then —

MR. KATSAS: But it, but —

JUDGE RANDOLPH: — the President says I wipe out —

MR. KATSAS: But —

JUDGE RANDOLPH: I hereby, don't interrupt me when I'm trying to interrupt you, okay?

JUDGE SENTELLE: You have to remember which ones are in charge here. You can go ahead.

JUDGE RANDOLPH: But the President could say, ah, no more federal question jurisdiction for Iraq. Ah, no more statute of limitations.

MR. KATSAS: We don't —

JUDGE RANDOLPH: No more any other provision, let's go down the U.S. Code. We'll just wipe all these out.

MR. KATSAS: All right, what your question goes to is there are two interpretive disputes in play. The one on which the case turns is whether TRIA is a statute that applies to countries that have supported terrorism, and I think we agree, the answer to that question has to be yes. The separate, the separate, Judge Randolph, you're raising a separate interpretative question about —

JUDGE RANDOLPH: No, what I'm suggesting to you, here's what I'm suggesting to you, Mr. Katsas, is that implicit in your entire argument is an interpretation that does not depend on the plain meaning of these words. Implicit in your argument is the proposition that this is, that statutes that are triggered by the fact that the country is a terrorist state —

MR. KATSAS: Right.

JUDGE RANDOLPH: — the President can wipe out. That's not exactly what the words say, but that's implicit in your argument. I understand that.

MR. KATSAS: But —

JUDGE RANDOLPH: My only point is that the plain meaning of this thing takes us off into the blue yonder, and I don't think that's where you want to go.

MR. KATSAS: But whether or not the statute is plain with respect to the question that you raise, the narrow interpretation that you're suggesting we think is the right one. Whether you call it a question of plain meaning, whether you call it application of a canon of avoiding absurd results. Whether you, however you come to the conclusion that the statute should be limited to provisions of law that apply by virtue of a country having supported terrorism, that is plainly the best reading of this statute, and once you adopt that reading, then the further question whether TRIA is a statute encompassed within 1503 is a clear one, is one that —

JUDGE RANDOLPH: I understand. I just, I'm just, this notion that, well, it's plain.

MR. KATSAS: Statutes —

JUDGE SENTELLE: This is the only fun we have in this job is picking on counsel.

MR. KATSAS: Statutes can be unambiguous with respect to some interpretive questions but ambiguous with respect to others.

JUDGE RANDOLPH: What about the question I raised with Mr. Baker that, well, why do we even have to reach TRIA? If the two provisions which are identical, the Export Administration Act and the Foreign Assistance Act no longer apply, then Iraq can no longer be considered designated a terrorist state, because the only authority to do that is under those two provisions, and therefore we don't even get to TRIA because it's inoperative.

MR. KATSAS: I think as a technical matter, we need a little bit more than just rendering inapplicable Section 620(a), because Section 6(j) of the Export Administration Act is a separate statute that can trigger TRIA as well. But the fact that —

JUDGE RANDOLPH: It can?

MR. KATSAS: I believe it can.

JUDGE RANDOLPH: It says either —

MR. KATSAS: I believe the triggers —

JUDGE RANDOLPH: Yes. One is the 620(a), then the other is 6(j) of the Export Administration Act. Now, I was just suggesting to you that those statutes are exactly the same. They're word-for-word.

MR. KATSAS: They are exactly the same, and I think that underscores the point that in construing the operative statutory text that addresses 620(a) and any other provision of law, etc., it is —

JUDGE RANDOLPH: Was Iraq designated under the Foreign Assistance Act of 1961?

MR. KATSAS: I believe it was designated under both.

JUDGE RANDOLPH: Well, you only cited the Export.

MR. KATSAS: Right.

JUDGE RANDOLPH: Federal Register.

MR. KATSAS: Right.

JUDGE RANDOLPH: Could you provide us after argument just with the citation to save us the trouble of having to find that other provision?

Now, while I'm on this subject, and I don't want to belabor it too much, and I know you have your argument.

MR. KATSAS: I —

JUDGE RANDOLPH: I just want to ask one more question. Under both of these statutes, the Secretary of State may rescind —

MR. KATSAS: Right.

JUDGE RANDOLPH: — a designation.

MR. KATSAS: Right.

JUDGE RANDOLPH: There's a six-month wait to do that after the change of leadership.

MR. KATSAS: And there are —

JUDGE RANDOLPH: The change of leadership in Iraq occurred when, approximately? The end of April?

MR. KATSAS: Something like that.

JUDGE RANDOLPH: All right, so it's May, June, July, August, September.

MR. KATSAS: There are conditions for rescinding that we couldn't meet.

JUDGE RANDOLPH: Yes, you have to file a report, that's all. You give a report to a committee of Congress. But so the six month is October. Is the Secretary rescinding, is there anything under way to rescind the designation of Iraq as a terrorist state?

* * * *

APPENDIX B — ANSWER OF SECRETARY OF SENATE-DESIGNATE HILLARY CLINTON TO QUESTIONS FOR THE RECORD

From: Barnes, Emily (Foreign Relations)
[mailto:Emily_Barnes@foreign.senate.gov]
Sent: Tuesday, March 17, 2009 11:16 AM
To: Tarnay, Eva
Subject: FW: Clinton QFR's on Iraqi Shields
Importance: High

Questions for the Record Submitted to

Secretary of State - Designate Hillary Clinton by

Senator Robert Menendez (#24)

Senate Foreign Relations Committee

January 13, 2009

Question:

You have been a strong advocate of compensation for persons who have been the victims of acts of terrorism and torture. During the Bush administration, such justice was denied to American citizens who had been seized by the Saddam Hussein regime in the period before the Gulf war, and used as human shields.

> As Secretary of State, would you support a resolution of this situation, by calling on the Iraqis to compensate those Americans who were seized and held as human shields?

Appendix B

Answer:

I intend to review this matter with a view to developing an effective approach for facilitating a resolution with Iraq, which includes making the claims of U.S. victims of terrorism a priority. The Department has engaged a range of involved parties, including officials in the Iraqi government and the claimants' counsel, and will continue to engage with Iraq to encourage it to develop a resolution of these victims' claims.

Iraq committed to work to settle existing claims and debts from the Saddam era, which would include claims from victims of acts of terrorism, in its request to the Security Council to extend the protections for an additional year for the Development Fund for Iraq (DFI) and Iraqi oil and gas exports and revenues, including protections from legal attachment. The United States supported UN Security Council resolution 1859 (2008), extending the previous protections. Foreign Minister Zebari also affirmed that the Government of Iraq was fully committed to resolving all legitimate claims and complying with its obligations under international law.

Kathryn Anderson
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APPENDIX C — GUIDE TO EWSAA § 1503

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